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Libellous Literature: Elton John and the Perils of Close Reading

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There are many reasons for studying literature's entanglements with the law. The most engaging, in my view, has to do with the fact that there is no way of telling how to distinguish literature from other kinds of writing either *a priori* or *a posteriori*. Like many artefacts of human endeavour – democracy, say, or Europe – literature does not constitute an object of knowledge as such. It is not a relatively stable *thing*, which we can learn to identify in the way we learn to distinguish Porsche 911s from other cars or African from Indian elephants. This is not news. The idea that literature cannot be defined once and for all had become a theoretical orthodoxy by the 1970s and 1980s, though, as I have argued elsewhere, the emphasis then tended to be placed on the problems associated with *a priori* definitions (McDonald 2006). The philosopher of art Arthur C. Danto summarized the mainstream view in the following characteristic terms: 'the concept of art [or literature] is not like the concept, say, of cat, where the class of cats do pretty largely resemble one another, and can be recognized as cats more or less by the same criteria' (1999: 7). Few theorists had much to say about the potentially greater challenges of *a posteriori* definition. On this account, literature is not simply an object of theoretical *debate*, perhaps even a quarrel, which, as a matter of principle, can never be resolved. In its most ambitious modes, it is also a self-reflexive, protean cultural *practice*, which often puts established protocols of understanding under extreme pressure, calling for different ways of thinking and new kinds of reader. Whether seen from an *a priori* or an *a posteriori* perspective, these definitional problems create acute difficulties for the law at the level of codification and judicial procedure.

The history of state censorship, which details the repeated failures of the state and its officials to have the last word on literary matters, is essentially an

archive of these problems. In the late 1980s, towards the end of the censorship era in apartheid South Africa, the writer J.M. Coetzee put it this way: censors have been 'so ineffectual, century after century', he said, 'because, in laying down rules that stories may not transgress, and enforcing these rules, they fail to recognise that the offensiveness of stories lies not in their transgressing particular rules but in their faculty for making and changing their own rules' (1988: 3). This is a rare statement of the *a posteriori* quandary. Yet it is not only censors, the traditional enemies of literature, for whom this more radical offensiveness creates difficulties. As a peculiarly disruptive form of public writing literature is no less of a problem for its defenders, particularly those who turn to the law for help. The challenges they face were well articulated in the late 1970s during a UK government enquiry into the effectiveness of the Obscene Publications Act, 1959, the legislation that explicitly incorporated an *exceptio artis*, or literary defence, into the Westminster statute book for the first time. Among other things, it afforded literature protection as a public good and authorized courts to call upon literary experts to testify on its behalf. Here, the state is no longer the 'bad' censor but the 'good' guardian of the literary. To put it in the Bourdieuan terms Ralf Grüttemeier and Ted Laros have recently used, we could say that the 1959 Act constituted an important landmark in the 'institutional autonomy' of literature in England and Wales in so far as it reflected a high degree of 'societal acceptance of the literary field within the field of power' and recognized that 'only literary specialists could evaluate literature' (2013: 205, 210). This is broadly true, though, as my own study of the original Victorian statute of 1857 and its initial implementation shows, the possibility of a literary defence was built into UK obscenity law from the start (McDonald 2008). The 1959 Act simply made that largely dormant defence more explicit and robust.

The problems associated with the state's well-meaning intervention on behalf of literature were soon apparent, however. The product of a concerted campaign in the 1950s, the new defence itself became the focal point of a further protest in the 1960s and 1970s, which eventually prompted the government to establish the commission of enquiry led by the philosopher Bernard Williams. Bearing in mind the temporary ban under the 1959 Act of Hubert Selby's controversial novel *Last Exit to Brooklyn* (1966), the commission remarked about the literary defence:

It is not surprising that [the Act] has been criticised as elitist in conception, and as saying in effect that corrupting books are to be permitted so long as they are

admired by professors. This criticism is largely unjust, but it hits at a basic fault in the Act, its absurd model of the role of expert opinion with regard to artistic or literary merit. The model is not so much elitist, as scholastic: it implies an informed consensus about merit which, for each work, already exists. In the real world, new works have to find their own way, and see whether they elicit appreciation or not. No one may know, for some time, what to think about them. It is not just a matter of the *avant-garde*: works in some despised medium or style may subsequently turn out to have had more meaning than most experts would have originally supposed (Williams 1979: 110).

The underlying scholasticism of the 1959 Act was exacerbated by the fact that it required the experts to establish, *as a matter of evidential proof*, whether a particular work might warrant exemption on the grounds of merit or, indeed, literariness. Given that such questions inevitably involve a long, uncertain process of cultural debate, which, from the theorists' point of view, would be inconclusive in principle, the commission argued that the 'public good' defence was 'misconceived' and recommended lifting all restrictions on the 'printed word' (Williams 1979: 126, 160). Books with illustrations were another matter. The only viable way of protecting the 'institutional autonomy' of literature was, it concluded, for the courts to play no part in the unavoidably contentious 'Republic of Letters'.

This recommendation, which successive UK governments have continued to ignore, has a number of significant implications. At the most general level, it obliges us to think again about an important further claim Grüttemeier and Laros make, namely, that 'judicial practice can be taken to manifest a kind of crystallisation of ideas on poetics within non-literary elites' (2013: 205). As the Williams commission suggested, and as I argued *The Literature Police* (2009), my own study of literary censorship under apartheid, this process of 'crystallisation' is inevitably fraught. I am not even sure that the metaphor is appropriate, particularly if it implies that 'ideas on poetics' are not just solidified but somehow clarified in the judicial process. Muddying is perhaps a more plausible figure. Besides, my own inclination is to turn the argument around: given the difficulties literature creates for judicial practice, what we tend to see when 'ideas on poetics' enter the courtroom is a muddying not just of those ideas but of the authority and protocols of the court itself. To demonstrate this, and to show that these concerns are not merely historical, nor, indeed, limited to obscenity trials, I shall focus on a recent UK libel case that addresses the particular problem of what happens when ideas of the literary are deployed not

by literary experts in the context of the law but by ‘non-literary elites’, in this instance, an Oxford-educated English High Court judge.

Before I turn to the details of the case, it will be worth briefly describing the legal background, especially as my example dates from 2008, that is, five years before the Defamation Act (2013) was passed. This was the first major reform of UK libel law since the 1950s. Historically libel has both an extensive meaning in UK law, covering blasphemy, sedition, obscenity and defamation, and a peculiarly precise designation where, in cases of defamation, it is contrasted to slander. Crudely stated, libel is defamatory writing, slander is defamatory speech. This reflects the etymology of the word, which derives from the Latin *libellous*, the diminutive for book. This curious distinction is unknown in most modern jurisdictions. In Scots law, for instance, both libel and slander are treated as ‘verbal injury’. Unsurprisingly, the distinction generated problems of its own in the changing media environment of the twentieth century from the advent of radio in the 1920s to the spread of the internet in the 1990s. In response to these developments, ‘written’ came to be understood, in the words of one English judgement from the 1930s, as ‘permanent matter to be seen by the eye’ (Deakin 2013: 637). Yet it was not only the medium of expression that created problems. Perhaps most significantly, unlike slander, libel did not historically require proof of damage from the plaintiff. Once the libel is proved, serious damage is assumed; whereas, in most cases, victims of slander are required to demonstrate actual damage relating to, say, loss of earnings. This idiosyncrasy, which created an opening for trivial or vexatious actions, was readily construed as a bias in favour of plaintiffs, particularly rich or powerful ones who could buy silence by threatening or instituting legal proceedings. The still controversial reforms introduced in 2013 were intended in part to close this loophole, requiring plaintiffs in libel cases to submit evidence of serious harm as they had been obliged to do in cases of slander. A further key feature of UK libel law is its anti-intentionalism. ‘Liability for libel does not depend on the intention of the defamer,’ one judge noted in the 1920s, ‘but on the fact of defamation’ (Deakin 2013: 633). Seen from the perspective of literary studies, this kind of anti-intentionalism may look like US New Criticism *avant la lettre*, but, unlike the New Critics of the 1940s, UK law did not substitute the vague and debatable intentions of the author/defamer for the apparently more objective ‘words on the page,’ the text of the libel. It shifted the burden on to its reception, which, as we shall see, only created a new set of quandaries with literary and legal consequences.

Unlike obscenity, and to a lesser extent blasphemy and sedition, libel rarely features in the cultural histories of literature and the law in the English-speaking world. Indeed, as Sean Latham comments in *The Scandal of Art* (2009), 'our understanding of the intersection between literature and the law' since the nineteenth century 'has been severely distorted by an almost obsessive focus on the famous obscenity trials of *Ulysses* and *Lady Chatterley's Lover*' (2009: 72). Yet the case history for this period is there. We need only recall Oscar Wilde's libel trials in the 1890s. Wilde's failure to clear his name was largely a consequence of the changes introduced under the Libel Act (1843), which held that in a criminal case the truth of an allegedly libellous claim constituted a legitimate defence, so long as its publication was also in the public interest. Wilde's own aesthetics, and some of the more dramatic moments of the trial, all turned on the question of art's claims to truth. For Latham, the fact that libel has been left out of the story is not surprising. The more famous obscenity trials, he argues, 'have become part of a liberal romance of art's ever-expanding freedom', one of literary history's most cherished grand narratives (2009: 72). By contrast, the various libel cases he discusses, all of which relate the genre of the *roman à clef*, oblige us to consider the extent to which 'literary modernism', or, for that matter, Wildean aestheticism, 'failed in what Pierre Bourdieu calls its "conquest of autonomy"' (2009: 73). Noting that his concerns lie as much with the gaps in literary history as with the orthodoxies of literary criticism, Latham opens his study with this playful gesture: 'Be warned: this book commits one of literary criticism's deadliest sins by treating seemingly fictional works from the early twentieth century as if they contained real facts about real people and events' (2009: 3). He then goes on to show how various writers in the course of the early twentieth century, including Joyce, Aldus Huxley, D.H. Lawrence, Wyndham Lewis, Osbert Sitwell and Jean Rhys, experimented with the *roman à clef*, testing and sometimes falling foul of, English libel law, while at the same time questioning the institutional and aesthetic autonomy of fiction. It is, however, not only the *roman à clef*, or, indeed, genres of writing that are generally considered to be literary, that probe the limits of libel law and oblige us to revisit the grand narrative of literature's conquest of freedom. As my own more contemporary example suggests, cases involving apparently more mundane forms of writing, which seldom feature in conventional literary histories, also have a bearing on these issues. Here, too, 'ideas on poetics' and 'judicial practice' confront each other with equally unpredictable consequences.

The case

In late September 2008, Sir Elton John sued the *Guardian* newspaper in the UK for libel. This is not especially remarkable. Elton John has been suing newspapers for the past thirty years on a fairly regular basis, often successfully. On this occasion, however, things proved less straightforward, mainly because of the nature of the public comments to which he took exception. The offending text, which first appeared in the *Guardian* on 5 July 2008, is worth citing in full, partly because it is a libel in the original etymological sense. It has the virtue of being short. The speaker is Sir Elton himself, and the text is a diary entry, covering two days in late June 2008. Sir Elton records his thoughts about attending Nelson Mandela's 90th birthday celebrations on the 25th and about a charity ball he held the following day at his Windsor mansion to raise funds for his Aids Foundation.

What a few days it's been. First I sang Happy Birthday to my dear, dear friend Nelson Mandela – I like to think I'm one of the few people privileged enough to call him Madiba – at a party specially organised to provide white celebrities with a chance to be photographed cuddling him, wearing that patronisingly awestruck smile they all have. It says: 'I love you, you adorable, apartheid-fighting teddy bear.'

The next night I welcomed the exact same crowd to my place for my annual White Tie & Tiaras ball. Lulu, Kelly Osbourne, Agyness Deyn, Richard Desmond, Liz Hurley, Bill Clinton – I met most of them 10 minutes ago, but we have something very special and magical in common: we're all members of the entertainment industry. You can't manufacture a connection like that.

Naturally, everyone could afford just to hand over the money if they gave that much of a toss about Aids research – as could the sponsors. But we like to give guests a preposterously lavish evening, because they're the kind of people who wouldn't turn up for anything less. They fork out small fortunes for new dresses and so on, the sponsors blow hundreds of thousands on creating what convention demands we call a 'magical world', and everyone wears immensely smug 'My diamonds are by Chopard' grins in the newspapers and OK. Once we've subtracted all these costs, the leftovers go to my foundation. I call this care-o-nomics. (Hyde 2008a: 16)

As I said, Sir Elton did sing at Mandela's 90th on 25 June 2008 and his White Tie and Tiara ball did take place on the 26th, but, as you will have by now guessed, this is not really a diary entry, and the speaker is not really Elton John. Following a well-established journalistic tradition in England, which can be traced back

to the seventeenth century at least, it is a spoof involving an act of rhetorical ventriloquism in which Marina Hyde, a *Guardian* staffer, does the smug but also acerbic voice of the celebrity prima donna for satirical purposes by purporting to quote from his diary. The regular column, to which Hyde often contributed, was called 'A Peek at the Diary of'.

This is not how Sir Elton saw it. On his reading Hyde's text was neither a diary entry nor a satirical parody of one. It was a libellous attack on his moral integrity. In a writ issued against the *Guardian* on 7 August 2008, suing the paper for £150,000 damages, he called it a 'gratuitously offensive, nasty and snide' slur, which damaged his reputation as a public-spirited philanthropist and Aids campaigner by falsely accusing him of being an insincere, uncaring self-promoter (Limbrick 2008). It is important to stress that, given the terms of English libel law and the level of compensation he sought, Sir Elton accused Hyde of knowingly making false claims with malicious intent. In earlier correspondence with the *Guardian*, he also said she had branded him a racist, a charge he subsequently dropped from the formal writ. The *Guardian* accepted none of this and, in an effort to get the matter sorted out as quickly and as cheaply as possible, it made an application for a judicial ruling on Hyde's words and their meaning. The hearing eventually took place in early December 2008 with the Hon Mr Justice Tugendhat presiding. Given the unpredictability of High Court appointment processes, the *Guardian* was lucky to get him. Unlike some of his esteemed colleagues, Tugendhat, then the most senior media judge in England and Wales, earned a reputation for being an especially robust defender of press freedom. William McCormack, instructed by Carter-Ruck, the UK's leading media law firm, represented Elton John; while Gavin Millar QC and Anthony Hudson, both defamation specialists of Doughty Street Chambers, represented Guardian News & Media Limited.

The hearing turned out to be an oddly academic affair, which has an unexpected bearing on the question of literature's status as an object of knowledge. Not for the first time, and no doubt not for the last, the Royal Courts of Justice in London's Strand became a forum for heated debate not just about the unique intricacies of UK libel law, the right to freedom of expression or, for that matter, the meaning of words but about how meaning is understood to be made and what role publishers, readers and ideas of the literary play in the process. Tellingly, though there were a number of avenues open to the *Guardian's* lawyers – they could, for instance, have argued that Hyde was justified in making her claims by proving them to be true, following

the provisions of the Libel Act (1843) – they chose to focus primarily on the defence of fair (now honest) comment in the public interest, which, somewhat surprisingly, turned on the even more subtle question of literariness. In their view, the words to which Sir Elton took exception were not actionable as libellous because they could not be ‘understood as statements of fact’, or even as allegations of fact (Tugendhat 2008: 27). Rather they were part of a specifically literary mode of writing. In making this argument, which is a particular version of the fair comment defence, they did not appeal to any supposedly inherent idea or unique property of literariness, say, that a literary text is always and only fictional (although, as we shall see, much turned on a particular understanding of irony). They focused on the question of how words might be taken to be literary depending on the context in which they appear. As Justice Tugendhat put it in his summing up, ‘it is common ground that the meaning of words, in law as in life, depends on their context,’ though, as he noted, following the arguments put forward by the defence, the term ‘context’ could be construed in two ways (2008: 20). In the first, the context referred to the larger ‘circumstances under which the words were published’, which, in this case, included the two key events, Nelson Mandela’s birthday and the White Tie and Tiara Ball (20). This has a particular bearing on the truth or falsity of Hyde’s claims. The second ‘narrower sense’, which Tugendhat took to be especially significant from a legal point of view, referred to the material context in which Hyde’s words were first published. This has a special pertinence to their literariness (20).

Drawing attention to the details of this narrower context was the burden of Tugendhat’s first lesson in the perils of close reading. By focusing exclusively on some of Hyde’s words, he argued, Elton John had made the fatal mistake of failing to give due weight to their precise provenance in the *Weekend* section of the Saturday *Guardian* for 5 July 2008. Adopting the pose of a careful descriptive bibliographer, Tugendhat explained perhaps a little too pedantically:

This section is made up of 104 pages (including advertisements), illustrated in full colour, and is itself divided into sections headed Starters, Fashion, Food & Drink, Features and so on. Like the Saturday editions of a number of other English newspapers aimed at an educated readership, *The Guardian* is made up of separate or pull out sections, of which Weekend is only one. While different types of speech can appear in any of these sections, the designation of the section assists in understanding the extent to which particular speech is to be understood as factual or not. Weekend is not the news section of the paper (2008: 23).

It is worth noting that Tugendhat did not mention the online version of the piece, which displays none of these print-based bibliographical features, making such fine discriminations between factual reportage and other ‘types of speech’ (strictly writing) much trickier in a digital context, a point to which I shall return (2008: 22).

Having established that the immediate print context constituted the first legally noteworthy frame for Hyde’s words, Tugendhat then turned to the article itself, and more particularly to its title, which, he argued, functioned as another key framing device, albeit one that was more difficult to read. By presenting the words under the heading ‘A Peek at the Diary of Sir Elton John,’ that is, as if they are an extract from a diary written by the Claimant “as seen” by the journalist, the editors, according to Tugendhat, chose not to indicate ‘what statement the reader is to expect, as title [*sic*] to news articles generally do’ (2008: 23). By contrast, the headline on page 2 of the main paper, which appeared under the running header ‘News,’ reads: ‘Johnson forced to remove his deputy mayor after magistrate claim proves false’ (Taylor 2008: 2). The report that follows then gives an account of Boris Johnson’s embarrassments over one of his first mayoral appointees who was obliged to resign amid allegations of financial misconduct. In this case, then, the title constitutes a précis of the factual report, helpfully guiding the reader’s expectations; whereas ‘A Peek at the Diary of’ plays all sorts of rhetorical games, setting a trap for unwary readers, especially those like Sir Elton who choose to read too closely.

Yet, as Tugendhat recognized, the argument from bibliographical provenance, though necessary for a literary defence, was not sufficient. After all, despite its location in the *Weekend* section, he noted that Hyde’s article contained ‘a number of statements of fact attributed to the Claimant [Sir Elton] which are true, and obviously intended to be understood as true’ (2008: 27). As everyone in the High Court acknowledged, these included the reference to Mandela’s birthday party, to the ball and to the photographs that did actually appear in the celebrity magazine *OK!* Tugendhat added that there were also some ‘statements of both fact and opinion’, citing as an example the spoof Sir Elton’s reference to the photographs in *OK!* (fact) and his comments on his fellow celebrities wearing their ‘immensely smug’ grins (opinion) (2008: 28). For Sir Elton’s lawyers, these complexities made it unclear which interpretative protocols applied, especially when it came to what they took to be the most offensive statement in the piece, the penultimate sentence: ‘Once we’ve subtracted all these costs, the leftovers go to my foundation’ (Hyde 2008a: 16).

In their view, the implications (specifically ‘innuendo’) of this sentence were clear, unliterary and so libellous: it meant that Sir Elton and the organizers of the Ball deducted ‘all the costs of providing the lavish evening, including the costs incurred by the guests for new dresses and diamonds, and that it was only the balance that went to the charitable foundation’ (Tugendhat 2008: 29).

At this point Tugendhat offered his second lesson in the perils of close reading, shifting the terms of his argument from bibliography to reception theory, from the materiality of the print *Guardian* to what he took to be the interrelated questions of readership and literariness. Having noted that the Saturday *Guardian*, with its various supplements like *Weekend*, was ‘aimed at an educated readership’ – the typical *Guardian* reader is popularly regarded as being a left-leaning member of the comfortable middle classes – he focused on what he termed, following legal precedent, the figure of the ‘reasonable reader’ (2008: 22, 28). When it came to deciding which interpretative protocols applied to the penultimate sentence, he was in no doubt that this particular reader would understand that ‘the words complained of are obviously written by the journalist, who has attributed them to the Claimant as a literary device’, and that the ‘transparently false attribution is irony’, which, he explained, is ‘a figure of speech in which the intended meaning is the opposite of what is expressed by the words used’ (2008: 24). For this reader, then, the fictionality of the entire piece was obvious. Irony, one of the subtlest, socially coded rhetorical devices, also applied more specifically to the key penultimate sentence, which, Tugendhat noted, is presented not as fact but ‘as an allegation that the Claimant is making against himself’ (24). Bringing together the two strands of his reading lesson, he suggested that no ‘reasonable reader’ would understand the sentence in the way Sir Elton had because she would ‘expect so serious an allegation to be made without humour, and explicitly, in a part of the newspaper devoted to news’ (32). By mistaking a piece of light-hearted, even ‘teasing’, literary satire for serious reportage, Sir Elton had, he concluded, suffered a sense of humour failure complicated by a bad case of hermeneutic myopia (31). Hyde’s article was therefore not actionable under UK libel law, and, consequently, Sir Elton’s claim for damages had to be struck out. Tugendhat also ordered him to pay costs, despite the fact that the *Guardian* had applied for the hearing.

Not content with this outcome, Sir Elton’s lawyers then took their case to the Court of Appeal, only to have it rejected once again. On 26 March 2009, over eight months after Hyde’s piece first appeared, they finally conceded defeat and gave up. No doubt the vanity of celebrities – who can also afford the fees – helps

to explain their persistence. Yet, since it is unlikely that an established and very successful firm such as Carter-Ruck would put its professional standing on the line without good reason, the tenacity of Elton John's team also says something about the legal niceties of the case.

The conclusion

This is where the legal story of Sir Elton's lessons in the perils of close reading ended. Yet, for anyone concerned about 'Literature in Law', I would argue that it is at this point that the real interest of the case starts. Seen from a literary rather than a legal perspective, the closure Justice Tugendhat brought to the proceedings, which was subsequently confirmed by the Court of Appeal, looks more pragmatic than principled. This is in part because, as I have already suggested, he chose to stabilize the process of meaning making by privileging the original print version of Hyde's piece, ignoring the complications any mention of the online version might introduce, an issue both legal teams also overlooked. Online publication, whether on the internet or via social media sites like Twitter, is especially testing for UK libel law not just because it raises new questions about the 'written' word, authorship and ownership, which the Defamation Act (2013) has attempted to address but because it does not necessarily bring with it the extrinsic markers of status and provenance associated with the traditional medium of print, which played such a central part in Tugendhat's determination. As the case history develops, however, the particular ways in which digital media create new forms of context for 'permanent matter to be seen by the eye' are being taken seriously (Deakin 2013: 637). In one noteworthy case from 2010, for instance, which relates to an allegedly libellous online article, the hyperlinks inserted in some of the words were deemed to constitute a part of the relevant meaning-making context (Deakin 2013: 633). In its online version Hyde's piece contains no hyperlinks, though it directs the reader to a number of related categories via a sidebar, including 'music', 'celebrity', 'life and style' and more from 'The Peek at' series, which it also describes as 'a glimpse inside the celebrity mind'. These arguably ensure that the online reader does not mistake the piece for factual reportage, albeit not as clearly as the contextual markers in the print *Weekend* supplement.

Tugendhat's ruling also looks more pragmatic than principled because he cut the interpretative uncertainties short by invoking the legal fiction of

the 'reasonable reader'. In so doing he was following sound legal precedents, though, as Markesinis and Deakin point out in their magisterial textbook *Tort Law* (2013), precedents that are a source of much legal contention. Setting out the key issues, they explain: 'Courts treat the meaning of words as a matter of construction rather than evidence, to be interpreted objectively in their context, with reference to the opinion of right-thinking members of society' (2013: 633).

This is why Tugendhat expressly made no mention of Hyde's intentions in his ruling and why he focused exclusively on the effects her words might have on what he called the 'reasonable reader', given the precise bibliographical provenance. Yet, as a test, this anti-intentionalist legal convention is, as Markesinis and Deakin observe, 'vague and unsatisfactory', not least because it begs a series of large questions about who the 'reasonable' or 'right-thinking members of society' might actually be (2013: 633). Given the emphasis Tugendhat placed on irony in his ruling, this has a particular bearing on the Elton John case. Did Tugendhat have a particular theory of irony? On the basis of what he says in his ruling, this is highly unlikely. At best, he was working with a very rudimentary critical lexicon, concerning irony, fiction and satire as literary devices, though, as I have suggested, one that none the less has some theoretical implications. His arguments assumed that irony cannot, for instance, be understood in purely structural terms, since its effects depend on what linguists call its pragmatic context. For Tugendhat, this was defined in part via the legal fiction of the 'reasonable reader', but, as I have already noted, irony is among the most precarious and socially charged rhetorical devices, relying as it does on easily missed (often veiled) markers, subtle inference and implied background knowledge, which only some readers might possess. It is, in fact, often used precisely to separate a narrow circle of those in the know (one version of the 'right-thinking') from a wider audience who cannot pick up the signals. As such, it is a consciously disruptive mode that courts misreading and cannot be understood independently of the complex, never wholly assured social contexts of its use.

As Tugendhat noted at various points in his ruling, such intricate interpretative issues would be a matter for the jury if the case actually went to court. This was written into UK law with 'Fox's Libel Act' (1792), which made juries the ultimate arbiters of whether or not a text is libellous. Until that point, judges had decided, and juries were required only to determine if the defendant had published the text. In the absence of a jury, Tugendhat was obliged to invoke the 'reasonable reader', which opened up other uncertainties. As the shifting legal

terminology during the latter half of the twentieth century shows, deciding who the 'right-thinking' or 'reasonable' might be is far from obvious. In the 1960s these readers were deemed to be 'ordinary' rather than 'logical' men; in the slightly less sexist 1980s, the 'hypothetical reader who is not unduly suspicious but who can read between the lines'; and, a decade later, the 'substantial and respectable proportion of society' (2013: 633–4). The terminological challenges are relatively minor, however. As Markesinis and Deakin note, the more pressing question is: 'Is the test of defamation what right-thinking persons belonging to the class to which the statement is published think? Or right-thinking persons *generally*?' (2013: 634). The case history since the 1930s indicates that the latter view has prevailed in UK courts, but, as we have seen, Tugendhat focussed on the 'reasonable reader' of the Saturday *Guardian* rather than reasonable readers in general. As a challenging recent case suggests, this judgement has particularly fraught implications in contemporary inter- or multicultural societies. Echoing the kinds of argument associated with the literary theorist Stanley Fish, who championed the idea of 'interpretative community' as the arbiter of meaning in the 1970s, a UK court of appeal in 2000 respected the particular construction members of the Muslim community might give to certain statements about women and sexuality. As Markesinis and Deakin then comment, this opens up the worrying possibility of 'the same statement having certain consequences for one section of the population of one state but not for other citizens of the very same state'. 'In an increasingly pluralistic society', they add in their rather bland textbook prose, 'the designation of one or more sections as "right-thinking" [or "reasonable"] results in difficulties' (2013: 635).

For the *Guardian* the outcome of the Elton John case was 'A victory for irony', but, in her own reflections on the whole episode, Marina Hyde, the journalist at the centre of it all, registered some mordant disquiet: 'We British have a rich tradition of irony and satire but there is very little case law protecting what may well turn out to be one of the few comforts left to us in these darkening times' (Campbell 2008: 1–2; Hyde 2008b: 2). Moreover, she added, 'there is something absurd about a silly little piece of fluff about Elton John's annual White Tie and Tiara ball being used to enshrine such important principles' (2008b: 2). She was none the less pleased that she had helped to defend 'our right to be a tiny bit ironic about a diamond-encrusted celebrity Aids fundraiser' (2). She was also happy to report that, according to the *Guardian's* 'head of legal', 'we made good law' (2). I am not so sure. Seen against the broader background I have been sketching, Justice Tugendhat's appeal to the 'reasonable reader', coupled with his decision

to restrict himself to the print version of Hyde's article, begins to look less like an assured 'victory' and the Royal Courts of Justice, for all their Victorian Gothic magnificence, start to lose some of their comfortingly impressive institutional solidity. They begin to seem less like authoritative bastions of interpretive clarity and more like vulnerable, because always questionable, sites of hermeneutic closure.

From a legal and journalistic point of view, Tugendhat may have determined the saving literariness of Hyde's 'piece of fluff' by accepting the *Guardian's* defence, thereby bringing the meaning of Hyde's words to a judicially defensible end and making 'good law'. From a literary point of view, it is clear that he could do so only by relying on a restricted conception of their public context, on the legal fiction of the 'reasonable reader', and on a socially laden and inescapably precarious idea of irony as a 'literary device'. Far from manifesting 'a kind of crystallisation of ideas on poetics' in the context of 'judicial practice' as exemplified by a member of a 'non-literary elite', then, this case reflects the challenges courts and other tribunals face when they attempt to treat literature as a clearly identifiable object of knowledge or to apply secure tests for literariness, exposing the gulf between literary and legal approaches to language, cultural value and meaning. As I have argued, it also suggests that the problem of scholasticism, which Bernard Williams's enquiry identified as one of the main faults of the British Obscene Publications Act, 1959, may be more pervasive than we like to think and may, in fact, be impossible to eradicate from the courtroom, given the particular, and ultimately pragmatic, imperatives of the law and the protean qualities of the literary. Since no one is safe from the perils of reading, whether closely or not, the Elton John case offers little assurance about the future of 'irony and satire' in England and Wales, and every assurance about the ongoing trouble literature will bring when it gets entangled with the law. And so the 'liberal romance' of literature's autonomy or 'art's ever-expanding freedom' remains as alluring and as unworkable as ever.

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